

WORKERS' COMPENSATION ADVISORY COUNCIL

MINUTES ~ MARCH 19, 1999 MEETING [10:00 A.M.]
710 JAMES ROBERTSON PARKWAY
HEARING ROOM, FIRST FLOOR
ANDREW JOHNSON TOWER
NASHVILLE, TENNESSEE

The meeting was called to order by Mr. Steve Adams.

Voting members in attendance:

Mr. Jack Gatlin
Mr. James G. Neeley
Mr. Bob Pitts
Mr. Carter Witt
Mr. Othal Smith, Jr. [by proxy to Mr. Neeley]
Ms. Jimmie K. Corder [by proxy to Mr. Witt]

Nonvoting members in attendance:

Ms. Jacqueline B. Dixon
Mr. Tony Farmer.
Ms. Abbie Hudgens [by telephone conference call]

Ex officio members in attendance:

Ms. Sue Ann Head, Assistant Commissioner of Labor
[designee for Commissioner Michael E. Magill]
Commissioner Doug Sizemore, Department of Commerce & Insurance

Also present:

M. Linda Hughes, Executive Director

The minutes of the February 26, 1999, Workers' Compensation Advisory Council meeting were unanimously approved.

NEW BUSINESS

1. REVIEW AND CONSIDERATION OF PROPOSED LEGISLATION

Prior to the meeting the members had received bill summaries prepared by staff. A revised summary for Senate Bill #597 and a letter dated March 16, 1999 from the Tennessee Psychological Association was distributed to the members at the meeting. Mr. Adams explained the procedure by which each bill would be considered. The Advisory Council agreed to review each summary and to determine if it accurately explained the bill and, if so, to approve it or if it did not, to agree on changes needed. The Executive Director then explained each bill and the following discussions and comments were made. [Unless otherwise stated, the Advisory Council approved the summary as distributed.]

>AMENDMENT TO: SB 200* by Haynes HB 1453 by Briley

Comments of Non-Voting Members:

TTLA Attorney Representative: Mr. Tony Farmer urged the voting members to support the bill as it shifts the burden from the taxpayers to the insurance companies who are doing business in the State of Tennessee. He suggested changes need to be made in the bill to address procedural details which need clarification, such as how the Assigned Risk Plan is notified and how the employee is assigned to a carrier.

Attorney Representative: Ms. Jackie Dixon thought the bill would be beneficial to workers who worked for an employer who has avoided obtaining coverage and does not have assets to pay a judgment. She thinks anything that can be done to force someone to carry insurance is beneficial. She also expressed concern the bill, as drafted, does not address the procedure by which an injured employee would obtain the benefits from the Assigned Risk Plan insurance company.

Municipal Government Representative: Ms. Abbie Hudgens expressed concern as to the bill's non-specificity as to when and what employers would be listed in the Department's report. She stated, in theory, the bill is on target; however, procedures are needed concerning how the claim is reported and other practical matters associated with the handling of and payment of the claim.

Comments of Voting Members:

Employee Representatives: The employee representatives felt the bill assures fairness for injured workers. The concern should not be how often this occurs, but that it occurs at all. When it does occur it is a tremendous burden on the injured employee and the employee's family.

Employer Representatives: The employer representatives, while indicating they are not unsympathetic to the problem, questioned the scope of the problem. They expressed concerns that

an insurer, who is not receiving any premium, is asked to pay a claim and incur those expenses. They view the issue as a need for more aggressive activity by the Department of Labor to assure all employers have workers' compensation coverage. They also stressed the injured worker still has the option to sue the employer in either common law tort or for workers' compensation benefits.

Recommendation of the Advisory Council [Voting Members]

The voting members were **equally divided** on this bill. The employee representatives recommended passage of the bill; the employer representatives recommended against passage of the bill.

The voting members were **unanimous** in their opinion that the **sponsors of the bill should be notified of the need for procedural clarification** in the event the bill goes forward. (e.g., How would an employee report such a claim; How would a carrier be assigned to a claim; How would it be determined if the employer was required to have coverage for the injured employee; Would the injured employee have the right to sue the Assigned Risk carrier if unable to agree on benefits to which the employee is entitled; Would the same time limits apply regarding making a claim, etc.?)

In addition, the Council urged that consideration be given to placing a time factor or waiting period into the provision requiring the Department to report non-covered employers to assure the employer was actually not insured..

>SB 221* by Cooper HB 1140 by McMillan

Mr. Neeley suggested the Practical Effect section be changed to reflect the average weekly wage would have to exceed \$880 per week, \$22.00 per hour or approximately \$45,000 per year.

Comments of Non-Voting Members:

TTLA Attorney Representative: Mr. Farmer urged the voting members to approve this bill because it impacts only a small percentage of the employees and these employees have a life based on a significant income, which is reduced significantly if an injury occurs. An increase would allow the employee to maintain the lifestyle and pay the bills incurred by the family.

Attorney Representative: Ms. Dixon agreed with the comments of Mr. Farmer.

Municipal Government Representative: Ms. Hudgens noted this bill would raise the cost of indemnity benefits.

Comments of Voting Members:

Employee Representatives: Mr. Jim Neeley noted this bill would affect only those employees who earn in excess of \$22.00 per hour, or \$880 per week, or more than \$45,000 per year. A copy of the document distributed by Mr. Neeley is attached as "Exhibit 1" following this summary.

Employer Representatives: Mr. Carter Witt noted no income taxes are paid on workers' compensation benefits. Attached hereto as "Exhibit 2" is a copy of a five page document distributed by Mr. Witt which addresses the issue of maximum weekly benefits.

Recommendation of Advisory Council [Voting Members]

The Advisory Council were **equally divided on this bill**. The employee representatives recommended passage of the bill; the employer representatives recommended against passage.

>SB 427 by Haynes HB 325* by Buck

Mr. Farmer suggested the summary be revised by deleting the last paragraph under the Practical Effect section.

Comments of Non-Voting Members:

TTLA Attorney Representative: Mr. Farmer agreed the statute needs to be simplified regarding the references to the judge or county chair. He stated current case law allows a workers' compensation claim to be brought in three places: the employee's residence, the residence of the employer or the place of accident.

Attorney Representative: Ms. Dixon recommended the bill be passed to clarify the issue of venue. She also felt the language related to the judge or county chair needed to be deleted.

Municipal Government Representative: Ms. Hudgens felt, as drafted, the bill does not provide equity to the parties as it would not allow an employer to bring suit in the county in which its principal place of business is located. She noted the bill might result in forcing an employer to travel to a county in another part of the state in the event the accident occurred in another county from that in which the employee resided. She felt the bill should allow the suit to be brought in the county in which the job was located or in which the employee principally worked.

Comments of Voting Members:

Employee Representatives: The employee representatives felt the bill should be passed to clarify existing case law.

Employer Representatives: The employer representatives were concerned that, as drafted, the bill is going beyond case law in that it deletes the option of filing suit in the county in which the employer is located.

Recommendation of Advisory Council [Voting Members]

The Advisory Council **unanimously recommended passage** of the bill *provided* it is amended to do the following:

(1) also delete sections 50-6-225(a)(2), (a)(3) and (b) [These sections also have references to the judge or county chair.] and

(2) in (a), following the words “county in which the”, delete the words “injured worker” and substitute the phrase “the employer, but not the employer’s insurer, or the employee”.

>SB 461* by Harper HB 1081 by West

Comments of Non-Voting Members:

TTLA Attorney Representative: Mr. Farmer felt it would be great to expand the pool of physicians available to the injured employee for treatment, but indicated the bill would create confusion for both the employee, employer and the insurer. He felt the bill created tremendous practical problems.

Municipal Government Representative: Ms. Hudgens was opposed to the bill for the following reasons: (1) It would be practically difficult unless the employer had the TennCare reimbursement schedule; (2) There is value in having a panel choice of physicians who are familiar with the workers’ compensation system, the AMA Guides and the methods to get an employee back to work on light duty status; (3) It puts a family physician in the difficult position of having to be objective and the family doctor relationship would hurt the workers’ compensation system. She felt the bill would establish bad policy.

Comments Of Voting Members:

Employee Representatives: The employee representatives expressed the need to expand the choices available to the employee, but were concerned the bill would set up a cumbersome procedure.

Employer Representatives: The employer representatives stressed it is the goal of the employer to provide the employee with the best medical treatment and the employer is not looking for doctors who will provide low impairment ratings. Economically, it is in the best interest of the employer to get the employee back to work. They felt the bill would result in decreased quality and increased time off work.

Recommendation of Advisory Council [Voting Members]

The Advisory Council **unanimously recommended against passage** of the bill because of the problems identified by the non-voting members.

>SB 485* by Haynes HB 1176 by Buck

Comments of Non-Voting Members:

TTLA Attorney Representative: Mr. Farmer stated, in his opinion, this issue is currently the largest problem in the workers' compensation system for all the participants due to the conflicting decisions from the Worker's Compensation Appeals Panel. He feels the issue should be addressed by the legislature this year.

Municipal Government Representative: Ms. Hudgens stated, as a practical matter, the employers want to pay a claim in a lump sum so the claim can be completely closed. She feels it will be more difficult in the future for an employee to obtain a lump sum settlement if the employer does not gain the advantage of closing the claim.

Comments Of Voting Members:

Employee Representatives: Mr. Neeley expressed the opinion that the bill assures that the intent of the 1992 Reform Act is carried out. The intent of the 1992 law was to ensure the employee the right to seek reconsideration if the employee leaves the job for any reason and to give the employee additional disability benefits if the employee is entitled to additional disability benefits.

Employer Representatives: Mr. Witt was of the opinion action should await the decision of the pending Supreme Court case on the subject.

Recommendation of Advisory Council [Voting Members]

The Advisory Council **unanimously deferred action** on Senate Bill 485 until the next Advisory Council meeting on April 9, 1999, to give members an opportunity to review the bill further and to consider what language could be used to accomplish the intent of the 1992 legislation.

>SB 530* by Crutchfield HB 748 by Buck

This bill addresses the same issue as Senate Bill 485. Therefore, the Advisory Council **unanimously deferred action** on Senate Bill 530 until the next Advisory Council meeting on April

9, 1999, to give members an opportunity to review the bill further and to consider what language could be used to accomplish the intent of the 1992 legislation.

>SB 531* by Crutchfield HB 751 by Buck

Recommendation of Advisory Council [Voting Members]

The Advisory Council **unanimously took no position on the bill** as written. The Advisory Council indicated it is willing to consider any amendment to the bill which is forwarded to it.

>SB 597 by McNally HB 139* by Odom

Recommendation of Advisory Council [Voting Members]

The Advisory Council **unanimously took no position on the bill** as written. The Advisory Council indicated it is willing to consider any amendment to the bill which is forwarded to it.

>SB 616* by Haynes HB 753 by Buck

Comments of Non-Voting Members:

Attorney Representative: It was Mr. Farmer's opinion the effectiveness of the Department of Labor and the specialist program are undermined if a specialist does not to have this authority. He reminded members if a court subsequently holds the specialist's decision was in error, the employer/insurer is reimbursed from the Second Injury Fund for benefits paid.

Comments of Voting Members:

Employee Representatives: Mr. Neeley thought the 1998 legislative change was designed to correct the problems concerning a specialist's authority; but if not, then it should be corrected.

Employer Representatives: Mr. Bob Pitts was concerned that the language be sufficiently written [in non-attorney language] to solve the problem.

Recommendation of Advisory Council [Voting Members]

The Advisory Council **unanimously recommended passage** of the bill. **In addition**, they recommended the word, "confirmation" in subsection (a) be changed to the word "continuation." [To correct an error in the 1998 legislation when printed.]

>SB 687* by McNally HB 694 by Jones, S.

Recommendation of Advisory Council [Voting Members]

Because of the problems indicated in the summary of the bill, the Advisory Council **unanimously recommended against passage** of the bill.

>SB 708 by Herron HB 301* by Maddox

Comments of Non-Voting Members:

TTLA Attorney Representative: Mr. Farmer urged the voting members to remember this benefit is not an award, rather it is a reimbursement of expenses incurred. The deceased employee's estate must provide documentation of expenses incurred and the estate is reimbursed only for what expenses were actually incurred.

Comments of Voting Members:

Employee Representatives: Mr. Neeley stated burial expenses vary throughout the State and a decent burial is not possible for the present maximum of \$4500. Mr. Neeley made a motion, seconded by Mr. Gatlin, to recommend the bill for passage. The vote on this motion was equally divided.

Employer Representatives: Mr. Witt made a motion, seconded by Mr. Bob Pitts, to recommend the bill be amended to change the maximum amount to \$5500. The vote on this motion was equally divided.

Recommendation of Advisory Council [Voting Members]

The Advisory Council was **equally divided** and **unable to reach consensus** on the bill.

>SB 709 by Herron HB 294* by Maddox

Advisory Council on Workers' Compensation Comment

Comments of Voting Members:

Employee Representatives: Mr. Neeley stated it is his belief that this has always been a problem in Tennessee law as to the value of a life. He stated he thought every death case should receive the same benefit - 400 weeks of the weekly compensation rate.

Employer Representatives: Mr. Witt noted workers' compensation is not intended to be life insurance. It is an income replacement for those who are dependent on the deceased for support.

Recommendation of Advisory Council [Voting Members]

The Advisory Council was **equally divided** and **unable to reach consensus** on the bill.

>SB 1148* by Crutchfield HB 1272 by Kisber

Recommendation of Advisory Council [Voting Members]

The Advisory Council **unanimously took no position on the bill** as written. The Advisory Council indicated it is willing to consider any amendment to the bill which is forwarded to it.

>SB 1223 by Haynes HB 754* by Buck

Comments of Non-Voting Members:

Attorney Representative: It was Mr. Farmer's opinion the effectiveness of the Department of Labor and the specialist program are undermined if a specialist does not have this authority. He reminded members if a court subsequently holds the specialist's decision was in error, the employer/insurer is reimbursed from the Second Injury Fund for benefits paid.

Comments of Voting Members:

Employee Representatives: Mr. Neeley thought the 1998 legislative change was designed to correct the problems concerning a specialist's authority; but if not, then it should be corrected.

Employer Representatives: Mr. Bob Pitts was concerned that the language be sufficiently written [in non-attorney language] to solve the problem.

Recommendation of Advisory Council [Voting Members]

The Advisory Council **unanimously recommended passage** of the bill. **In addition**, they recommended the word, "confirmation" in subsection (a) be changed to the word "continuation." [To correct an error in the 1998 legislation when printed.]

>SB 1294 by Davis, L. HB 963* by Head

Recommendation of Advisory Council [Voting Members]

The Advisory Council **unanimously took no position on the bill** as written. The Advisory Council indicated it is willing to consider any amendment to the bill which is forwarded to it.

>SB 1352* by McNally HB 1216 by McKee

Recommendation of Advisory Council [Voting Members]

The Advisory Council **unanimously recommended against passage** of the bill. The recommendation was based on the following: (1) the Assigned Risk Plan currently fulfills a need for a workers' compensation insurer of last resort; and (2) any substantial change to the workers' compensation insurance system should be deferred until after review by the Advisory Council on Workers' Compensation in accordance with the directives of the 1996 Reform Act [TCA 50-6-121(e)(3)].

>SB 1368 by Person HB 688* by Jones, S.

Recommendation of Advisory Council [Voting Members]

Because of the problems indicated in the summary of the bill, the Advisory Council **unanimously recommended against passage** of the bill.

>SB 1444* by Elsea HB 1153 by Cole-Dyer

Comments of Non-Voting Members:

Attorney Representative: Ms. Dixon expressed her view that the reforms which have been enacted in the past few years should be allowed an opportunity to work and, therefore, would recommend against passage of the bill.

Comments of Voting Members:

Employee Representatives: Mr. Neeley stated his belief that the bill reduces workers' benefits in Tennessee.

Employer Representatives: Mr. Witt stated his belief that this bill would take some of the benefits from those employees who are able to return to work for the same employer with same or higher pay and transfer those benefits to those employees who are more significantly injured and unable to return to work. It sets up objective means for determining disability based on the same considerations which are in current law. It would add fairness to the system and assure uniform benefits for similar injuries. Mr. Witt stated the bill does not cut gross benefits to injured workers in Tennessee.

Recommendation of Advisory Council [Voting Members]

The Advisory Council was **equally divided** on this bill. The employee representatives recommended against passage of the bill. The employer representatives recommended passage of the bill.

>SB 1510 by Wilder HB 755* by Buck

Mr. Farmer suggested the summary be changed by deleting the last two (2) sentences in the first paragraph under the Practical Effect section as the appeals panel will not necessarily always include a supreme court justice.

Recommendation of Advisory Council [Voting Members]

The Advisory Council **unanimously deferred action** on Senate Bill 1510 until the next Advisory Council meeting on April 9, 1999, to give members an opportunity to review the bill further.

>SB 1740 by McNally HB 1819* by Sands

Recommendation of Advisory Council [Voting Members]

The Advisory Council **unanimously recommended against passage** of the bill. The recommendation was based on the following: (1) the Assigned Risk Plan currently fulfills a need for a workers' compensation insurer of last resort; and (2) any substantial change to the workers' compensation insurance system should be deferred until after review by the Advisory Council on Workers' Compensation in accordance with the directives of the 1996 Reform Act [TCA 50-6-121(e)(3)].

2. SECOND INJURY FUND - STATUS REPORT

Sue Ann Head, Assistant Commissioner of Labor reported a meeting to discuss the Second Injury Fund had been held at which representatives from the Governor's office, Comptroller's office, Treasurer's office, Department of Labor, Attorney General's office and the Advisory Council were present. The general consensus was that the Second Injury Fund attorneys should participate in mediations and should be given amount of settlement authority to enable them to settle the claim at the mediation. The Department is to prepare proposal for a pilot project with policies and parameters established to govern how settlement authority will be granted.

The next meeting was scheduled for Friday, April 9, 1999 at 1:00 p.m. to discuss the deferred bills and any other amendments which may be presented to the Advisory Council for comment.

The meeting was adjourned at 1:20 p.m.